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THE COURT OF APPEAL RULES ON THE SCOPE OF SECTION 59 OF THE *LABOUR CODE* WITH RESPECT TO A DEFINITIVE BUSINESS CLOSURE

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THE QUÉBEC COURT OF APPEAL RENDERED AN IMPORTANT DECISION ON THE LEGALITY OF TERMINATION OF EMPLOYMENT FOR SOME 190 EMPLOYEES OF THE WAL-MART STORE IN JONQUIÈRE.[1] IN THE CONTEXT OF SEVERAL PROCEEDINGS, WHICH WERE FILED TO OBTAIN COMPENSATION FOR THOSE JOB LOSSES, THE UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 503 (HEREINAFTER THE **"UNION"**) ARGUED THAT THE STORE'S CLOSURE IN APRIL 2005 WAS CONTRARY TO SECTION 59 OF THE *LABOUR CODE* (HEREINAFTER THE **"*L.C.*"**). THIS SECTION IMPOSES A FREEZE ON THE CONDITIONS OF EMPLOYMENT FROM THE FILING OF A PETITION FOR CERTIFICATION UNTIL THE RIGHT TO LOCK OUT OR TO STRIKE IS EXERCISED OR AN ARBITRATION AWARD IS HANDED DOWN. ESSENTIALLY, THE COURT OF APPEAL WAS REQUIRED TO ANSWER THE FOLLOWING QUESTION: DOES SECTION 59 *L.C.* APPLY TO A DEFINITIVE BUSINESS CLOSURE?

CONTEXT

The closing of the Jonquière store by Wal-Mart Canada triggered a rich judicial saga that raised delicate questions with respect to labour law. In one of those decisions, the Supreme Court of Canada heard the case of a former employee of the same store, a man named Plourde, and made an important ruling.[2]

Plourde argued that the loss of his job, following the store's closure, represented a sanction imposed upon him because he had exercised a right arising from the *L.C.*, thus triggering the application of ss. 15 to 17 *L.C.* The Supreme Court ruled that the existence of an ongoing workplace was an essential condition which needs to be satisfied prior to the issuance of an order pursuant to ss. 15-17 *L.C.*[3] In addition, the Supreme Court reiterated that given the current state of Quebec law, an employer was under no obligation to continue operating its business. The Court therefore concluded:

> "If an employer, for whatever reason, decides as a result to actually close up shop, the dismissals which follow are the result of ceasing operations, which is a valid economic reason not to hire personnel, even if the cessation is based on socially reprehensible considerations."[4]

[1] *Compagnie Wal-Mart du Canada* v. *Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 503*, 2012 QCCA 903.

[2] *Plourde* v. *Wal-Mart Canada Corp.*, 2009 SCC 54 [2009] 3 S.C.R. 465 (hereinafter "Plourde").

[3] *Plourde*, par. 4.

[4] *Plourde*, par. 41, quoting *City Buick Pontiac (Montréal) Inc.* v. *Roy*, [1981] T.T. 22.

The Supreme Court also mentioned that ss. 12 to 14 *L.C.* open up the possibility for wider claims by employees. Under certain circumstances, these sections would allow affected employees to obtain damages as a result of a store closure for anti-union motives:

> "The rule in Quebec that an employer can close a plant for "socially reprehensible considerations" does not however mean it can do so without adverse financial consequences, including potential compensation to the employees who have thereby suffered losses." [5]

The dismissal of Plourde's recourse by the Supreme Court did not deter the Union, which filed a complaint pursuant to section 59 *L.C.* The Union alleged mainly that the closing of the Jonquière store by Wal-Mart constituted illegal changes to the conditions of employment of the newly unionized employees.

The grievance was heard by the arbitrator Jean-Guy Ménard, who concluded, in September 2009, that Wal-Mart had to show that its decision to close the store was justified in the context of the normal course of business.[6] Since Wal-Mart chose not to explain how the "business decision" to close the store was justified, the arbitrator ruled that the dismissals constituted changes to the conditions of employment. Consequently, he allowed the grievance.

On judicial review, Justice Moulin from the Superior Court also ruled that Wal-Mart had to demonstrate that its decision was justified in the context of the normal course of business.[7] He ruled that the arbitrator's decision was not unreasonable.

It is against this backdrop that the case was brought before the Court of Appeal in order to examine the appropriateness of past decisions that declared illegal, pursuant to section 59 *L.C.*, the dismissals announced by the employer.

THE DECISION OF THE COURT OF APPEAL: THE DEFINITIVE CLOSURE OF THE JONQUIÈRE STORE DOES NOT ALTER THE CONDITIONS OF EMPLOYMENT

As previously mentioned, given the current state of Quebec law, an employer is under no obligation to continue operating its business.

Justice Léger made a detailed analysis of the arbitrator's decision and found a certain number of contradictions. Acknowledging that the case law had established that a definitive business closure constitutes just cause for dismissal, the judge noted that the arbitrator had turned this matter into a debate about the reasons for the store's closure instead of focusing on the reason for those dismissals in the first place, thereby committing a reviewable error. Justice Léger explained as follows that flaw in the arbitrator's argument:

> "[translation] How can he, on the one hand, confirm the principle that closure of a business constitutes a proper justification for an employer to dismiss, notwithstanding the reasons for closure, and, on the other hand, rule that under such circumstances, maintaining the employment relationship constitutes a condition of employment? This syllogism appears contradictory. Based on this reasoning, a dismissal, even with just cause, would represent a change to the conditions of employment. In other words, this logic would be tantamount to preventing the employer from dismissing any employee during the period covered by section 59 *L.C.*
>
> It seems to me unreasonable to write, in the same ruling, that the closure of a business constitutes a proper justification for dismissal and refuse thereafter to recognize that the same business closure justifies those dismissals." [8]

[5] *Plourde*, par. 8.

[6] Arbitral award rendered on September 18, 2009 by the arbitrator Jean-Guy Ménard.

[7] *Compagnie Wal-Mart du Canada* v. *Ménard*, 2010 QCCS 4743, pars. 40 et seq.

[8] *Id.*, pars. 96 and 97.

According to Justice Léger, the arbitrator's reasoning had the effect of widening the scope of section 59 *L.C.* by granting the employees an employment security which they were not entitled to prior to the filing of the application for certification. Even though section 59 *L.C.* imposes a freeze on the conditions of employment, it cannot be construed so as to improve the employees' conditions of employment.

Despite those convincing arguments, Justice Léger was reluctant to permanently shut the door to the application of section 59 *L.C.* in all cases of business closure. According to him, it is possible to imagine cases where employment security is included in the employees' conditions of employment. For example, he mentioned that certain companies may promise their employees that they will continue their business operations for a certain number of years.[9]

Justice Léger did not further discuss the content and scope of such an employer commitment to continue its business operations. However, the question which must be considered in light of the conclusions found in *Plourde*, is whether the appropriate remedy in such a situation could be the reopening of the business and the reinstatement of the employees, or rather, the awarding of compensation.[10]

Justice Vézina and Justice Gagnon have reached the same conclusion as their colleague, albeit more succinctly: the definitive closure of a store does not constitute a change in the conditions of employment but rather represents the outright elimination of jobs. In other words, business operations do not change, they disappear altogether. Justice Vézina summarized his ruling with the following analogy:

> "[translation] One never attempts to prescribe medication to cure the illness of a patient once that person is dead. Likewise we cannot resolve an issue involving business operations when the business no longer exists."[11]

COMMENTS

The latest episode in the Wal-Mart saga reaffirms the principle that an employer can cease its operations at any given time and for whatever reason. However, it is important to remember the following two points.

First, as stated by the Supreme Court in *Plourde*, the application of ss. 12 to 14 *L.C.*, gives rise to the possibility of a broader scope of remedies, such that employees might be awarded damages for losses they have suffered as a result of a store closure for anti-union motives.[12]

Second, Justice Léger's holding suggests that the application of section 59 *L.C.* may be invoked in certain specific business closure cases. It is therefore possible that this position will be interpreted and elaborated on by courts in the future. It should be noted that the Union applied for leave to appeal this decision to the Supreme Court of Canada.

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[9] *Id.*, par. 103.

[10] *Id.*, par. 104.

[11] *Id.*, par. 119.

[12] *Plourde*, pars. 12 and 13.

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